

SERVED: August 19, 1993

NTSB Order No. EA-3957

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 5th day of August, 1993

Application of)

JEFFREY DEAN SCRAPE)

for an award of attorney and)
expert consultant fees and)
related expenses under the)
Equal Access to Justice Act)
(EAJA).)

Docket No. 124-EAJA-
SE-11924

OPINION AND ORDER

The Administrator has appealed from the initial decision of the administrative law judge granting applicant \$2670 in attorney fees in this matter.¹ We grant the appeal and vacate the award.

Contrary to the law judge, we find that the Administrator was substantially justified as that term is used in EAJA and, therefore, no award may issue.²

¹A copy of the law judge's initial decision is attached.

²Pursuant to NTSB Order EA-3884 (1993), applicant filed a supplemental request seeking an increased award to reflect our recent increase of the fee ceiling. See 49 C.F.R. 821.26 and 58
6121

The relevant facts are simple. On May 23, 1991, the Administrator issued his order, seeking revocation of applicant's private pilot certificate for violating 14 C.F.R. 61.89(a)(1) and 91.9.³ The revocation order alleged that, on June 6, 1987, while operating an aircraft as pilot in command, applicant carried a passenger; at that time, applicant held only a student pilot certificate. The Notice of Proposed Certificate Action (NOPCA) was served on applicant on August 3, 1987. Motion to Dismiss at 2.

For some reason unresolved in the record, the informal conference applicant requested was not held, and the case was not pursued until 1991. Following issuance of the order in 1991, it appears that the Administrator invited applicant to an informal conference, which he chose not to attend.⁴ Significantly, applicant alleges that he was led to believe by prior FAA counsel that the case had been closed. The Administrator disagrees,

(..continued)

Federal Register 21543 (April 22, 1993). In light of our disposition, the supplemental request is moot. We will note, however, that the original EAJA application sought recovery for 35.6 hours; the supplemental filing and applicant's reply, seek recovery for 48 and 48.3 hours, respectively, without providing any supporting documentation. In addition, applicant's calculations wrongly assume that the average of the 1991 and 1992 inflators is applied to the total number of hours for both years. We require a more specific approach: each year's total fee must be calculated separately, using the inflator for that year.

³Section 61.89(a)(1) prohibits a student pilot from acting as pilot in command of an aircraft that is carrying a passenger or passengers. Section 91.9 (now 91.13) provided that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

⁴Applicant appears to disagree, but resolution of this issue is not relevant to our disposition.

arguing that there are no documents to support this statement.

The law judge dismissed the complaint, on applicant's motion, based on the stale complaint rule, 49 C.F.R. 821.33.⁵ The Administrator did not appeal, and this EAJA application followed.

The law judge found applicant qualified and, relying on his prior decision on the merits, granted the EAJA application after finding that the Administrator was not substantially justified in his complaint.⁶ The law judge stated:

The Judge's Opinion and Order set forth two reasons that the Stale Complaint Rule applied to the Administrator. First, the Judge found several reasons that supported

⁵"In short, rule 33 provides that, except in cases where lack of qualification is at issue (in which case the rule does not apply), the Administrator's failure to serve the Notice of Proposed Certificate Action (NOPCA) on a respondent within 6 months generally will result in dismissal of the complaint, unless the Administrator can establish good cause for the delay.

In applying this rule, the allegations of the complaint are to be taken as true. 49 C.F.R. 821.33(b)(1). The purpose of the rule is to ensure respondents timely notice of the Administrator's investigation so that they may have a fair and equally timely opportunity to develop evidence in their defense."

Application of US Jet, NTSB Order EA-3817 (1993) at footnote 5.

⁶"To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." Application of US Jet, NTSB Order EA-3817 (1993). That the government failed to appeal the law judge's dismissal does not compel a conclusion that the prosecution was not substantially justified. Federal Election Com'n v. Rose, 806 F.2d 1081 (D.C. Cir. 1986) (it is not whether the government wins or loses or whether the government appeals that determines whether its position is substantially justified).

Applicant's contention that the case was closed by the original attorney some years prior. Second, the Judge held that even if the case had not been closed, the issuance of the Notice of Proposed Certificate Action did not grant the Administrator unlimited time to prosecute, and to hold otherwise would subvert the Stale Complaint Rule's intent as articulated in Administrator v. Stewart, 2 NTSB 140, 1142 [sic] (1974). The Order stated further "the circumstances strongly suggest the Administrator seeks to use the exception (to the Stale Complaint Rule) as a mere procedural ploy . . . furthermore the case does not present a lack of qualifications issue."

Thus, it is readily deduced from the Order that the FAA was not substantially justified in bringing this enforcement action against the Respondent.

We do not agree. As noted, the stale complaint rule is intended to ensure that respondents have timely notice of FAA investigations so that they may develop (or preserve) information in their defense. Thus, by its terms, and as relevant here, rule 33 requires dismissal only "where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action." In this case, that advice (notice) was given within the 6-month period, and we do not espouse the law judge's extension of the rule to any case where the Administrator's prosecution, for whatever reason, has been delayed.⁷

⁷We have, in certain cases, agreed that complaints should be dismissed even if they do not run afoul of the stale complaint rule but the delay has prejudiced a respondent's ability to defend. See, e.g., Administrator v. Wells, NTSB Order EA-3424 (1991); and Administrator v. Shrader, NTSB Order EA-3018 (1989). Although applicant claims prejudice, he fails to show any. We do not share applicant's view that, in effect, his carrying on with his life without aviation incident, as well as general "fairness" concerns, should preclude the Administrator from this delayed prosecution. In any case, whether they should does not control the EAJA analysis.

Furthermore, the stale complaint rule does not allow dismissal -- and does not even apply -- in cases where lack of qualification is an issue (relying on the allegations in the complaint as if true, see footnote 4, supra). Lack of qualification is squarely in issue when a student pilot carries a passenger. See, e.g., Administrator v. Marsalko, 1 NTSB 893 (1970) ("This Board, and the Civil Aeronautics Board before it, have traditionally viewed the action of a student pilot carrying a passenger as a serious offense which warrants revocation.").⁸

Finally, in response to applicant's other contentions, we note that his obtaining an upgraded certificate after the incident but before the order is typical, and is not grounds to find the complaint insufficient. The complaint more than adequately apprised applicant of the issues. It should be axiomatic that a student pilot should not risk carrying passengers and it should also be obvious that doing so raises serious concerns about the pilot's judgment, responsibility, and willingness to comply with other regulations, i.e., his qualifications.⁹ Accordingly, we find that the Administrator was

⁸That the Board will normally reduce the sanction to a 6-month suspension upon a showing by a respondent that he has pursued his interest in aviation, demonstrated an increased level of qualification, and received a private pilot license, see Administrator v. Crabtree, 1 NTSB 1186 (1971), detracts somewhat from the Administrator's policy of seeking revocation, but this does not merit finding that, overall, the Administrator was not substantially justified in pursuing the matter.

⁹We note that there is no indication that, in response to the NOPCA, applicant offered any mitigating circumstances for his action.

reasonable in law in pursuing the complaint.

The record, as made, also supports a conclusion that the Administrator acted reasonably in fact. He indicates reliance, which we find reasonable, on the case monitoring system in place (which the unrebutted evidence indicates requires, in part, that any closing of the file be reflected in some written document and that various computer entries be made). He could locate no such document or entry. Therefore, it was not unreasonable, in our view, that he chose not to rely on applicant's claim of oral notification of the closing of the case.

Moreover, applicant does not argue that the substance of the complaint -- piloting an aircraft with a passenger aboard prior to obtaining an appropriate certificate -- is untrue, nor does it appear he offered the Administrator any reason to doubt the truth of the allegation.

Having found the Administrator's position reasonable in law and in fact, and it being clear that the facts will support the legal theory, there may be no EAJA award.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is vacated; and
3. The EAJA application is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.